

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	8:09CR3
)	
v.)	
)	ORDER
ANTONIO FRAUSTO,)	
)	
Defendant.)	
_____)	

This matter is before the court on the defendant's motion to vacate under 28 U.S.C. § 2255, Filing No. [226](#). Under the Rules Governing Section 2255 Proceedings for the United States District Courts ("2255 Rules"), the court must perform an initial review of the defendant's § 2255 motion. See 28 U.S.C. § 2255, Rule 4(b). The rules provide that unless "it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court," the court must order the United States Attorney to respond to the motion. *Id.* The rules also provide that if "it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief," the court must dismiss the motion. *Id.*

The defendant entered a plea of guilty on June 17, 2009; and he was sentenced ON July 9, 2010, to 240 months. Judgment, Filing No. [184](#). His sentence was affirmed on appeal and the mandate issued on May 13, 2011. Filing No. [215](#) and Filing No. [219](#). Frausto filed his motion to vacate on December 23, 2011. Filing No. [226](#). In his § 2255 motion, the defendant alleges that he did not knowingly and voluntarily enter his guilty plea due to misrepresentations by counsel, that his attorney was ineffective for failing to obtain

spectrographic voice identification, that his counsel was ineffective on appeal, and that he did not qualify for a leadership role.

On initial review, the court finds that “it does not plainly appear that the defendant is entitled to no relief,” and that the government should be required to answer. On receipt of the government’s answer, the court will determine (a) whether to order the parties to submit briefs on the merits, so that the defendant’s claims may be resolved on the basis of the record and briefs, or (b) whether an evidentiary hearing is required. See Rule 8(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts.

THEREFORE, IT IS ORDERED:

1. On initial review, the court finds that summary dismissal is not appropriate.
2. The United States shall file an answer to the defendant’s § 2255 motion within 21 days of the date of this order.

DATED this 13th day of July, 2012.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States District Judge

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